

MT LEGISLATIVE HISTORY

Chapter 630 1987

Bill (H) 727 S \_\_\_\_\_

Original bill & hist. ✓ C

H. Committee on Business & Labor

S. Committee on Labor & Employment

Hearing Date(s) FEB 16 ✓ C

Hearing Date(s) March 19 ✓ C

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Date Out \_\_\_\_\_ C

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Did this bill originate in an interim committee? \_\_\_\_ Yes \_\_\_\_ No

Committee \_\_\_\_\_

Report \_\_\_\_\_

HOUSE BILL NO. 727  
INTRODUCED BY WINSLOW

IN THE HOUSE

FEBRUARY 12, 1987                   INTRODUCED AND REFERRED TO COMMITTEE  
ON BUSINESS & LABOR.

FEBRUARY 16, 1987                   COMMITTEE RECOMMEND BILL  
DO PASS AS AMENDED. REPORT ADOPTED.

FEBRUARY 17, 1987                   PRINTING REPORT.

FEBRUARY 19, 1987                   ON MOTION, CONSIDERATION PASSED  
FOR THE DAY.

FEBRUARY 20, 1987                   SECOND READING, DO PASS.

FEBRUARY 21, 1987                   ENGROSSING REPORT.

                                     THIRD READING, PASSED.  
                                     AYES, 70; NOES, 23.

                                     TRANSMITTED TO SENATE.

IN THE SENATE

FEBRUARY 23, 1987                   INTRODUCED AND REFERRED TO COMMITTEE  
ON LABOR & EMPLOYMENT RELATIONS.

APRIL 23, 1987                   ON MOTION, TAKEN FROM COMMITTEE ON  
LABOR & EMPLOYMENT RELATIONS AND  
PLACED ON SECOND READING THIS DAY.

                                     SECOND READING, CONCURRED IN.

                                     THIRD READING, CONCURRED IN.  
                                     AYES, 33; NOES, 16.

                                     RETURNED TO HOUSE.

IN THE HOUSE

APRIL 23, 1987

RECEIVED FROM SENATE.

SENT TO ENROLLING.

1 HOUSE BILL NO. 727  
2 INTRODUCED BY Winkler  
3  
4 A BILL FOR AN ACT ENTITLED: "AN ACT TO EXEMPT FROM MINIMUM  
5 WAGE AND OVERTIME LAWS EMPLOYEES OF LODGING ESTABLISHMENTS  
6 OR PERSONAL CARE FACILITIES WHO, UNDER THE TERMS OF THEIR  
7 EMPLOYMENT, LIVE IN THE ESTABLISHMENT OR FACILITY; AND  
8 AMENDING SECTION 39-3-406, MCA."  
9  
10 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:  
11 Section 1. Section 39-3-406, MCA, is amended to read:  
12 "39-3-406. Exclusions. (1) The provisions of 39-3-404  
13 and 39-3-405 shall not apply with respect to:  
14 (a) students participating in a distributive education  
15 program established under the auspices of an accredited  
16 educational agency;  
17 (b) persons employed in private homes whose duties  
18 consist of menial chores such as babysitting, mowing lawns,  
19 cleaning sidewalks;  
20 (c) persons employed directly by the head of a  
21 household to care for children dependent upon the head of  
22 the household;  
23 (d) immediate members of the family of an employer or  
24 persons dependent upon an employer for half or more of their  
25 support in the customary sense of being a dependent;

(e) any persons not regular employees thereof who voluntarily offer their services to a nonprofit organization on a fully or partially reimbursed basis;

(f) handicapped workers engaged in work which is incidental to training or evaluation programs or whose earning capacity is so severely impaired that they are unable to engage in competitive employment;

(g) apprentices or learners, who may be exempted by the commissioner for a period not to exceed 30 days of their employment;

(h) learners under the age of 18 who are employed as farm workers, provided that such exclusion shall not exceed a period of 180 days from their initial date of employment and further provided that during this exclusion period wages paid such learners may not be less than 50% of the minimum wage rate established in this part;

(i) retired or semiretired persons performing part-time incidental work as a condition of their residence on a farm or ranch;

(j) any individual employed in a bona fide executive, administrative, or professional capacity as these terms are defined and delimited by regulations of the commissioner;

(k) any individual employed by the United States of America;

(l) persons employed in lodging establishments or

1 personal care facilities who, under the terms of their  
2 employment, live in the establishment or facility.

3 (2) The provisions of 39-3-405 do not apply to:

4 (a) an employee with respect to whom the United States  
5 Secretary of Transportation has power to establish  
6 qualifications and maximum hours of service pursuant to the  
7 provisions of 49 U.S.C. 304;

8 (b) an employee of an employer subject to the  
9 provisions of part I of the Interstate Commerce Act;

10 (c) an individual employed as an outside buyer of  
11 poultry, eggs, cream, or milk, in their raw or natural  
12 state;

13 (d) a salesman, partsman, or mechanic paid on a  
14 commission or contract basis and primarily engaged in  
15 selling or servicing automobiles, trucks, mobile homes,  
16 recreational vehicles, or farm implements if he is employed  
17 by a nonmanufacturing establishment primarily engaged in the  
18 business of selling such vehicles or implements to ultimate  
19 purchasers;

20 (e) a salesman primarily engaged in selling trailers,  
21 boats, or aircraft if he is employed by a nonmanufacturing  
22 establishment primarily engaged in the business of selling  
23 trailers, boats, or aircraft to ultimate purchasers;

24 (f) an employee employed as a driver or driver's  
25 helper making local deliveries who is compensated for such

1 employment on the basis of trip rates, or other delivery  
2 payment plan, if the commissioner finds that such plan has  
3 the general purpose and effect of reducing hours worked by  
4 such employees to or below the maximum workweek applicable  
5 to them under 39-3-405;

6 (g) an employee employed in agriculture or in  
7 connection with the operation or maintenance of ditches,  
8 canals, reservoirs, or waterways not owned or operated for  
9 profit and not operated on a sharecrop basis and which are  
10 used exclusively for supply and storing of water for  
11 agricultural purposes;

12 (h) an employee with respect to his employment in  
13 agriculture by a farmer, notwithstanding other employment of  
14 such employee in connection with livestock auction  
15 operations in which such farmer is engaged as an adjunct to  
16 the raising of livestock, either on his own account or in  
17 conjunction with other farmers, if such employee is:

18 (i) primarily employed during his workweek in  
19 agriculture by such farmer; and

20 (ii) paid for his employment in connection with such  
21 livestock auction operations at a wage rate not less than  
22 that prescribed by 39-3-404;

23 (i) an employee of an establishment commonly  
24 recognized as a country elevator, including an establishment  
25 which sells products and services used in the operation of a

1 farm, if no more than five employees are employed by the  
2 establishment;

3 (j) a driver employed by an employer engaged in the  
4 business of operating taxicabs;

5 (k) an employee who is employed with his spouse by a  
6 nonprofit educational institution to serve as the parents of  
7 children who are orphans or one of whose natural parents is  
8 deceased or who are enrolled in such institution and reside  
9 in residential facilities of the institution so long as the  
10 children are in residence at the institution and so long as  
11 such employee and his spouse reside in such facilities and  
12 receive, without cost, board and lodging from the  
13 institution and are together compensated, on a cash basis,  
14 at an annual rate of not less than \$10,000;

15 (l) an employee employed in planting or tending trees;  
16 cruising, surveying, or felling timber; or transporting logs  
17 or other forestry products to a mill, processing plant,  
18 railroad, or other transportation terminal if the number of  
19 employees employed by his employer in such forestry or  
20 lumbering operations does not exceed eight;

21 (m) an employee of a sheriff's department who is  
22 working under an established work period in lieu of a  
23 workweek pursuant to 7-4-2509(1);

24 (n) an employee of a municipal or county government  
25 who is working under a work period not exceeding 40 hours in

1 a 7-day period established through a collective bargaining  
2 agreement when a collective bargaining unit represents the  
3 employee or by mutual agreement of the employer and employee  
4 where no bargaining unit is recognized. Employment in  
5 excess of 40 hours in a 7-day, 40-hour work period must be  
6 compensated at a rate of not less than 1 1/2 times the  
7 hourly wage rate for the employee.

8 (o) an employee of a hospital or other establishment  
9 primarily engaged in the care of the sick, disabled, aged,  
10 or mentally ill or defective who is working under a work  
11 period not exceeding 80 hours in a 14-day period established  
12 through either a collective bargaining agreement when a  
13 collective bargaining unit represents the employee or by  
14 mutual agreement of the employer and employee where no  
15 bargaining unit is recognized. Employment in excess of 8  
16 hours per day or 80 hours in a 14-day period must be  
17 compensated for at a rate of not less than 1 1/2 times the  
18 hourly wage rate for the employee.

19 (p) a firefighter who is working under a work period  
20 established in a collective bargaining agreement entered  
21 into between a public employer and a firefighters'  
22 organization or its exclusive representative;

23 (q) an officer or other employee of a police  
24 department in a city of the first or second class who is  
25 working under a work period established by the chief of

1 police under 7-32-4118;

2 (r) an employee of a department of public safety  
3 working under a work period established pursuant to  
4 7-32-115."

5 NEW SECTION. Section 2. Extension of authority. Any  
6 existing authority of the commissioner of labor and industry  
7 to make rules on the subject of the provisions of this act  
8 is extended to the provisions of this act.

-End-

STATUS SHEET

50th LEGISLATIVE SESSION

BUSINESS AND LABOR

COMMITTEE

| HOUSE<br>BILL<br>NUMBER | ENTERED<br>COM.<br>DATE | DATE<br>CON-<br>SIDERED | OUT OF<br>COM.    | DO PASS<br>DATE | DO NOT<br>PASS<br>DATE | DO<br>PASS AS<br>AMENDED<br>DATE | DO NOT<br>PASS AS<br>AMENDED<br>DATE | BE CON-<br>CURRED<br>IN<br>DATE | BE<br>NOT CON-<br>CURRED<br>IN<br>DATE | BE CON-<br>CURRED IN<br>AMENDED<br>DATE | BE NOT<br>CONCURRE<br>IN AS<br>AMENDED<br>DATE |
|-------------------------|-------------------------|-------------------------|-------------------|-----------------|------------------------|----------------------------------|--------------------------------------|---------------------------------|----------------------------------------|-----------------------------------------|------------------------------------------------|
| 699                     | 2/13/87                 | 2/17/87                 | 2/17/87           |                 |                        | 2/17/87                          |                                      |                                 |                                        |                                         |                                                |
| 719                     | 2/13/87                 | 2/17/87                 | 2/17/87<br>tabled |                 |                        |                                  |                                      |                                 |                                        |                                         |                                                |
| 723                     | 2/13/87                 | 2/17/87                 | 2/17/87<br>tabled |                 |                        |                                  |                                      |                                 |                                        |                                         |                                                |
| 727                     | 2/13/87                 | 2/16/87                 | 2/16/87           |                 |                        | 2/16/87                          |                                      |                                 |                                        |                                         |                                                |
| 728                     | 2/13/87                 | 2/17/87                 | 2/17/87<br>tabled |                 |                        |                                  |                                      |                                 |                                        |                                         |                                                |
| 763                     | 2/16/87                 | 2/18/87                 | 2/18/87<br>tabled |                 |                        |                                  |                                      |                                 |                                        |                                         |                                                |
| 765                     | 2/16/87                 | 2/18/87                 | 2/18/87           | 2/18/87         |                        |                                  |                                      |                                 |                                        |                                         |                                                |
| 769                     | 2/16/87                 | 2/18/87                 | 2/18/87           |                 |                        | 2/18/87                          |                                      |                                 |                                        |                                         |                                                |
| 771                     | 2/16/87                 | 2/18/87                 | 2/18/87           | 2/18/87         |                        |                                  |                                      |                                 |                                        |                                         |                                                |
| 772                     | 2/16/87                 | 2/18/87                 | 2/18/87           |                 |                        | 2/18/87                          |                                      |                                 |                                        |                                         |                                                |
| 784                     | 2/17/87                 | 2/19/87                 | 2/19/87           |                 |                        | 2/19/87                          |                                      |                                 |                                        |                                         |                                                |
| 789                     | 2/17/87                 | 2/19/87                 | 2/24/87           |                 |                        | 2/24/87                          |                                      |                                 |                                        |                                         |                                                |
| 796                     | 2/17/87                 | 2/19/87                 | 2/19/87           | 2/19/87         |                        |                                  |                                      |                                 |                                        |                                         |                                                |
| 799                     | 2/18/87                 | 2/19/87                 | 2/19/87<br>tabled |                 |                        |                                  |                                      |                                 |                                        |                                         |                                                |

Use a separate sheet for Senate Bills, House Bills, and Resolutions.



read, "there is one subscriber for each build line of a small telecommunication provider". He said there are a lot of little operators that might have several telephones, such as an individual line to a building, party line, or extension line and it should be weighed on the basis of the amount of service they are providing, and the word "line" would do that. The motion carried with Rep. Wallin, Rep. Nisbet, and Rep. Brown opposed.

Rep. Driscoll stated this is the same thing that was done for the water companies, and the water rates in Billings doubled because no review is required. He said the same thing is going to happen in this situation as these companies are not cooperatives but are profit telephone companies, and there are not enough safeguards in this bill.

Chairman Kitselman explained that in this bill there is a 10% petition, an automatic Consumer Counsel, and the PSC can review the rates. He said none of these three safeguards were in the situation regarding the water companies rates.

Rep. Brandewie moved that House Bill No. 691 DO PASS AS AMENDED. The motion carried with Reps. Pavlovich, Hansen, Driscoll, Brown, and Cohen opposed.

HOUSE BILL NO. 727 - Exempt Live-In Employees From Minimum Wage and Overtime Law, sponsored by Rep. Cal Winslow, House District No. 89, Billings. Rep. Winslow stated that this bill is an act to exempt from the minimum wage and overtime laws, employees of lodging establishments, and personal care facilities who live in the establishment. He said this addresses the problems that small motel and hotel owners have because of their small staff and a person that lives on the premises, usually a manager, that is on call 24 hours a day.

#### PROPOSERS

Ernie Dutton, Billings, submitted written testimony. Exhibit No. 13.

Steve Waldron, representing Montana Residential Child Care Association. Mr. Waldron stated that they are likely to lose some of those foster care group homes if they have to pay minimum wage to the staff that stay on the premises if this legislation passes.

#### OPPOSERS

Chris Volinkaty, representing the developmentally disabled people in the state of Montana. Ms. Volinkaty stated that this bill is open ended, and the problem is the budget and

not minimum wage. She said it is not fair if these people can't be paid \$3.35 per hour to make sure that things are going well in these group homes.

#### QUESTIONS

None.

#### CLOSING

Rep. Winslow stated that this bill is not an attempt in any way to lower wages in these facilities. He said they are addressing the people that live 24 hours on the premises. He said that the bill could be amended to address the fact that only resident managers are affected, and not the employees that work eight hour shifts in group homes, or maids in the hotels and motels.

#### EXECUTIVE ACTION

##### ACTION ON HOUSE BILL NO. 594

Rep. Pavlovich moved that House Bill No. 594 DO PASS.

Rep. Swysgood stated there were problems with this bill; the language is broad as to who determines what; the bill is too open ended.

Rep. Simon stated this bill refers to intent, and it is virtually impossible to prove somebody's intent. He said there are a number of other provisions that are very difficult, and it would be impossible to enforce a bill such as this.

Chairman Kitselman stated that there are a lot of problems with this bill and it needs work to address the issues and their intent. He said there are no provisions in the bill to take care of legal costs, but the references to punitive damages and exemplary damages have been reinserted.

Rep. Swysgood moved a substitute motion that House Bill No. 594 BE TABLED. The motion carried with a voice vote of 10 to 8.

##### ACTION ON HOUSE BILL NO. 500

Rep. Driscoll moved that House Bill No. 500 DO PASS.

Rep. Driscoll stated that the opponents thought they would automatically get a license and all the bill states is that they would get credit for all the classes they have already taken.

# SAINT ROLL CALL

BUSINESS & LABOR

COMMITTEE

80th LEGISLATIVE SESSION -- 1987

Date February 16, 1987

| NAME                            | PRESENT | ABSENT | EXCUSED |
|---------------------------------|---------|--------|---------|
| REP. LES KITSELMAN, CHAIRMAN    | ✓       |        |         |
| REP. FRED THOMAS, VICE-CHAIRMAN | ✓       |        |         |
| REP. BOB BACHINI                | ✓       |        |         |
| REP. RAY BRANDEWIE              | ✓       |        |         |
| REP. JAN BROWN                  | ✓       |        |         |
| REP. BEN COHEN                  | ✓       |        |         |
| REP. JERRY DRISCOLL             | ✓       |        |         |
| REP. WILLIAM GLASER             | ✓       |        |         |
| REP. LARRY GRINDE               | ✓       |        |         |
| REP. STELLA JEAN HANSEN         | ✓       |        |         |
| REP. TOM JONES                  | ✓       |        |         |
| REP. LLOYD MCCORMICK            | ✓       |        |         |
| REP. GERALD NISBET              | ✓       |        |         |
| REP. BOB PAVLOVICH              | ✓       |        |         |
| REP. BRUCE SIMON                | ✓       |        |         |
| REP. CLYDE SMITH                | ✓       |        |         |
| REP. CHARLES SWYSGOOD           | ✓       |        |         |
| REP. NORM WALLIN                | ✓       |        |         |
|                                 |         |        |         |
|                                 |         |        |         |
|                                 |         |        |         |
|                                 |         |        |         |
|                                 |         |        |         |

Rep. McCormick commented that he is against this bill because there isn't time to work out the problems. He said the cosmetologists' and the barbers' associations should work together on this bill to resolve the problems.

Rep. Brown moved a substitute motion that House Bill No. 500 DO NOT PASS. The motion carried with a voice vote of 13 to 5, with Reps. Driscoll, Hansen, Bachini, Glaser, and Brandewie opposed.

ACTION ON HOUSE BILL NO. 727

Rep. Hansen moved that House Bill No. 727 DO NOT PASS.

Rep. Hansen stated that there are other ways to handle that situation, such as contracts, etc. She said if a person is living in a group home, they are not paid by the hour anyway, and in the case of personal care attendants, they do a good job for the hours they are hired for, and they do deserve that minimum wage.

Rep. Simon commented that the small motels have owners or managers that are on duty 24 hours a day, are not specifically doing anything, but need to be there to check people in and out. He said that the intent is not to actually pay less than the minimum wage for what is considered a normal shift.

Rep. Swysgood moved an amendment on page 2, line 25, insert "resident managers" in place of "persons", and also in the title, on line 5, strike "employees" and insert "resident managers". The motion carried unanimously.

Rep. Thomas moved a substitute motion that House Bill No. 727 DO PASS AS AMENDED.

Rep. Pavlovich moved a substitute motion that House Bill No. 727 BE TABLED. The motion failed.

Rep. Thomas's substitute motion that House Bill No. 727 DO PASS AS AMENDED was voted on. The motion carried with a voice vote of 10 to 8.

ACTION ON HOUSE BILL NO. 54 (was not heard)

Rep. Thomas moved that House Bill No. 54 BE TABLED. The motion carried unanimously.

Rep. Thomas stated that House Bill No. 54 provides for exempting directors and officers of non-profit organizations personally for the liability of the organizations. He said the reason he is asking to table this bill at this time is

Mr. Chairman & committee members.

For the record, my name is Ernie Dutton. I reside at 4456 Audubon Way in Billings.

Let me begin by giving you some background information. I am part owner of two small motels in Billings. One has 21 rooms, the other has 28. These motels are typical of many small motels throughout Montana. Each motel is managed by a married couple who live on premise. In addition, we hire several part-time maids to clean the rooms. We ask \$19<sup>00</sup>/night for singles and \$70<sup>00</sup>/week for weeklies.

Both motels have lost money during each of the last 3 years. Small motels such as these are very marginal businesses, even during good times. But small motels continue to exist in Montana, because they continue to serve a need, especially in small rural communities that could not support a larger motel.

I am here today to ask you to give your approval to HB Bill # 727, which would "exempt from minimum wage and overtime laws employees of lodging establishments."

under the terms of their employment, live in the establishment or Facility;" We are asking you to exempt our on-premise managers from the existing law because it is economically impossible for us to comply with the current law. There is probably not a single small motel in the state that is managed by an on-site manager that is in full compliance with a strict interpretation of the present law. Why is compliance impossible? Because the current law can be interpreted such as to require that an on-premise manager be paid minimum wage plus overtime for 24 hours per day, 365 days per year, or over \$40,000<sup>00</sup>/yr. Some small motels don't gross \$40,000<sup>00</sup>/yr. We are currently paying our managers, including room, utilities, etc., about \$14,000<sup>00</sup> per year.

I went to an attorney to find out how we could change our operation in order to comply with the law. The attorney's nine pages of research will be submitted to your committee. The attorney's conclusion was that the existing laws actually work against the small business. For instance, we would get some relief, if the motel manager would fall into the executive exemption under Montana

employees, and devote less than 20% of his or her time to non-management type activities. Neither criteria is met in small motels, that have small staffs, and where each employee wears several hats.

Small motels will be the main beneficiaries of this legislation. Larger motels, by necessity, hire several shifts to cover the front desk. Larger motels, grossing over \$362,500<sup>00</sup> annually will continue to have to comply with the Federal minimum wage laws for all employees.

You won't find alot of innkeepers testifying before you today, because very few are aware of the problem. For some reason, this portion of the law has not been stringently enforced. However, I found one motel that has paid over \$19,000<sup>00</sup> to a former manager who took her case to the Labor Standards Division.

Without this legislation, small motels will continue to incur a potentially great liability. Yet, their ability to pay is almost nonexistent. Allow them to stay in business - to provide good, honest jobs and to serve their community's needs. I ask you to please support HB Bill No. 727

DAVIDSON, POPPLER & VANNOY, P.C.  
Attorneys at Law  
SUITE 810, FIRST BANK BUILDING  
BILLINGS, MONTANA 59101-1297

JOHN R. DAVIDSON  
DORIS M. POPPLER  
C. V. VANNOY

EXHIBIT *did not file*  
DATE 2/16/87  
Telephone 248 9156  
Area Code 406 727

February 19, 1986

Magic City Investors  
Attn: Mr. Dutton  
P. O. Box 21184  
Billings, Montana 59104

Re: Minimum Wage Requirements

Dear Mr. Dutton:

Pursuant to your request I have researched the question of the requirements of the Montana wage and hour statutes as applied to the motel business.

The minimum wage and overtime compensation statutes are set out in Part 4 of Chapter 39 MCA. A few basic definitions are necessary in order to analyze the scope of the problem. "Employee" includes any individual employed by an employer. "Wage" means compensation due to an employee by reason of his employment payable in legal tender of the United States or check on banks convertible into cash on demand at full face value, subject to such allowance as may be permitted by regulations of the commissioner under 39-3-403. The term "wage" includes the reasonable cost to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees; provided, however, that in no case shall such inclusion exceed an amount equal to 40% of the total wage paid by such employer to such employee (§39-3-402(7) MCA).

The statute then establishes minimum wage at at least \$3.05 an hour after 9/30/85 and before 10/1/86, and at least \$3.35 an hour on 10/1/86 and thereafter (§39-3-404 MCA). Overtime compensation requires a workweek no longer than 40 hours unless such employee receives compensation for his employment in excess of 40 hours in a workweek at a rate of not less than one and one-half (1½) times his hourly rate. There are 31 exclusions set out where the overtime provisions do not apply. There is only one which could be applied to a motel manager. This exclusion is "any individual employed in a bona fide executive, administrative, or professional capacity as defined by the regulations of the commissioner of labor (§§39-3-405, 406 MCA).



Magic City Investors  
Attn: Mr. Dutton  
February 19, 1986  
Page Two

In reviewing the facts of your two motels, it appears that these motels have in the past hired a husband and wife who are furnished an apartment, utilities and other facilities plus a wage of approximately \$600.00 a month. As part of the manager's duties, he works as desk clerk, collects the monies, supervises the maids and does some routine maintenance and also laundry. He is on duty 7 days a week and 24 hours a day. The wife customarily helps out with these duties.

1. Does the motel manager fall into the executive exemption of the Montana law?

In order to be exempt as an executive, the employee must have managerial responsibilities; be able to hire and fire; or recommend that other employees be hired and fired; must supervise at least two (2) full time employees (a recent case ruled that the two full time employees requirement could be met by part time employees working 80 hours a week); must customarily and regularly exercise discretionary powers; in addition he must not devote more than twenty percent (20%) of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described above.

In addition it does not apply in case of an employee who is in sole charge in an independent establishment or a physically separated branch establishment, or who owns at least a twenty percent (20%) interest in the establishment and is compensated for his service on a salary basis of not less than \$150 a week, exclusive of board, room and other facilities. Such an employee is considered to be an employee in a bona fide executive capacity even though he exceeds the applicable percentage limitation on nonexempt work. However, the pay must be high enough to assure that the minimum wage law is not being circumvented.

In our example above, if we assume his pay at \$600 plus \$450 for room, utilities and other facilities, \$1,050 a month divided by \$3.05 an hour = 344.26 hours a month divided by 30 days = 11.5 hours a day maximum allowable. We would need to pay him \$13.73 a day more to work him 16 hours a day.

2. Can we circumvent these provisions through a contract on reasonable agreement?

Reasonable agreements revolve around computing compensation for overtime actually worked. Case law holds that an employee may not enter into an agreement which operates to waive compensation. If he is there, and subject to call, he is considered to be working. The administrative procedures manual specifically sets out many examples of such agreements, or schemes, which did not work.

Magic City Investors  
Attn: Mr. Dutton  
February 19, 1986  
Page Three

In addition, the labor standards board says he must have at least five hours uninterrupted sleep a night.

Among the agreements which were not allowed were a lump sum or fixed sum for varying amounts of overtime; a flat rate for special job performed in overtime hours; payment only for productive time, e.g., waiting time, travel time, or similar "non-productive" time.

3. What can the employer do to protect himself against large overtime assessments?

The employer must keep records in order to supply the information necessary in an administrative hearing - for example, time cards and records. The burden is on the employer. All the employee needs to do is produce sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. An employer must refute by producing evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the evidence of the employee.

Incidentally, this risk holds for eighteen (18) months after discharge.

The precedent setting case, Garsjo v. Dept. of Labor, is found in 562 P.2d 473. Its facts are right in point with our case.

This is an appeal from the district court, Valley County, which affirmed a wage decision by a hearings examiner in favor of Loraine Horner.

Carlyle M. Garsjo, employer, is the owner of the Rainbow Motel in Glasgow, Montana. In mid-summer 1974 he hired Loraine Horner, employee, to operate the motel. The first month she was employed on a trial basis and paid by the hour. During this month she worked and was paid for 14 hours per day. At the end of the trial period, she was hired full-time at \$275 per month salary and an apartment at the motel valued at \$125 per month which she was required to live in. During the term of the employment, employee's duties consisted of checking people in and out of the motel; attending the motel switchboard; keeping all of the motel records; doing a large part of the daily cleanup which included changing sheets, cleaning the rooms, doing

Magic City Investors  
Attn: Mr. Dutton  
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the laundry, and other maintenance work. She was assisted in the cleanup by a series of part-time maids. The employer came by every few days to pick up the proceeds for deposit in the bank. Employee kept the records at the motel and the only hours she kept, after she became a salaried employee, were those hours she worked on her day off and for which she was paid overtime.

In the fall 1974, employee asked for a raise and failing to get one filed a wage claim with the Montana Department of Labor and Industry. A hearing was held before a Department of Labor and Industry hearings examiner who found that employee (1) was not employed in a "bona fide executive \* \* \* capacity," (2) was covered by the Montana Minimum Wage and Hours Act; (3) was not paid the proper wage; and (4) was due \$2,267 in back wages.

The employer argued that the employee should be exempt as an executive. The Court responded:

The provisions of section 41 2303 of this act shall not apply with respect to:

\* \* \* \*

(j) Any individual employed in a bona fide executive, administrative, or professional capacity as these terms are defined and delimited by regulations of the commissioner.

The commissioner of labor has promulgated regulations which cover over 40 pages in the Montana Administrative Code interpreting this section of the Act. For the most part these rules are a verbatim copy of the federal regulations (29 C.F.R. Part 541) promulgated to interpret the equivalent section of the Fair Labor Standards Act, modified to make them compatible with the Montana statute.

The regulations involved here are MAC 24-3.14BII(2)-S1420 and MAC 24-3.14BII(2)-S1450(13). The first rule defines "Executive" and reads as applies here:

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- (1) The term "employee employed in a bona fide executive \* \* \* capacity" in section 41-2304(j) of the Montana Minimum Wage Law shall mean any employee:
  - (a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof; and
  - (b) Who customarily and regularly directs the work of two or more other employees therein; and
  - (c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and
  - (d) Who customarily and regularly exercises discretionary powers; and
  - (e) Who does not devote more than 20 percent or in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in subsections (a) through (d) of this section:

Provided, That this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20 percent interest in the enterprise in which he is employed; and
- (f) Who is compensated for his services on a salary basis at a rate of not less than \$150 per week, exclusive of board, lodging, or other facilities \* \* \*.

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MAC 24-3.14BII(2)-1450(13) deals with the  
"sole-charge exception" and states in pertinent  
part:

- (a) An exception from the percentage limitations on nonexempt work is provided in MAC 24-3.14BII(2)-S1420 subsection (e) for "an employee who is in sole charge of an independent establishment or a physically separated branch establishment \* \* \*." Such an employee is considered to be employed in a bona fide executive capacity even though he exceeds the applicable percentage limitation on nonexempt work.

\* \* \*

The regulations attempt to set out specific objective and subjective criteria which are generally characteristic of an executive's job. Certainly an executive must manage as his primary duty, and it would be rare indeed to find an executive who did not direct two or more employees - employees he has the authority to hire and fire. The typical executive's job requires the exercise of discretion and he does executive type work as a substantial, if not exclusive, part of his job. Therefore, these regulations are logical and well within the boundaries of the fair and natural meaning of the word "executive."

Here, employee does not fall within the requirements of subparts (a) through (e), MAC 24-3.14BII(2)-S1420, because she exercises little discretion and spends a substantial amount of her time doing nonexecutive work.

\* \* \*

The effect of the regulations set out above is that an employee who meets the requirements of MAC 24-3.14BII(2)-S1420, subparts (a) through (e), is a bona fide executive and is excepted from the minimum wage and overtime provisions of the statute. If the employee (1) spends over 40% of

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(1) her time doing nonmanagement work, but is in sole charge of an independent enterprise, (2) meets the requirements of subparts (a) through (d), and (3) is paid more than \$150 per week, then there is also an exception to the general applicability of the wage and hour provisions of the statute. The logic of these regulations is clear. A real full-time executive doing executive work is given an exemption from the minimum wage and overtime provisions no matter what he is paid, but an executive who does a substantial amount of nonexecutive work for which the minimum wage would have to be paid if done by another person, may avoid the provisions of the Act only if the pay is high enough to assure that the minimum wage law is not being circumvented. (Emphasis added)

The Court also discussed the burden of proof as follows:

Here, employer did not keep records required by law and which could have easily supplied the needed information. In *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687, 66 S. Ct. 1187, 1192, 90 L.Ed. 1515, 1523, the United States Supreme Court in a Fair Labor Standards Act case discussed this difficulty:

"\* \* \* where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. The solution, however, is not to penalize an employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. \* \* \*"

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Finally, the Court awarded the employee attorney's fees and costs and assessed a statutory penalty against the employer.

It appears to me that the motel owners, especially small motels, must attempt to obtain a legislative exemption from the legislature such as agricultural workers have, or small businesses under the Federal Fair Labor Standards Act. In Montana, Article XII, Section 2 of our Constitution states "that a maximum period of eight hours is a regular day's work in all industries and employment except agriculture and stock raising. The legislature may change this maximum period to promote the general welfare."

Minimum wage and overtime compensation provisions are then set out in Title 39, Chapter 3, Part 4 MCA as quoted previously in this opinion. The exclusions are found in §39-3-406. This part and section is the target area for a legislative revision of the law. For example, the 1985 legislature added exclusions for public safety department employees; officers or other employees of a police department in a city of the first or second class working under a work period established by the chief of police under §7-32-4118 MCA; certain employees of municipal and county governments; certain employees of hospitals and other health care facilities; and the 1981 legislature excluded certain employees of the Sheriff's department.

The Federal Fair Labor Standards Act is found in Title 29 U.S.C., with the minimum wage and hours provisions found in Sections 206 and 207. The general exclusions from minimum wage extends to certain overseas areas under the control of the federal government. There is also an agricultural provision. However in the footnotes it is interesting to note a policy statement which really points up the problem to employers throughout the country. It reads:

The policy of overtime provisions of FLSA is to spread employment throughout the work force by putting financial pressure on the employer, and to compensate employees for burden of overtime workweek.

Apparently, until 1979 there was some type of limited exemption for hotel, motel and restaurant workers. Under 29 U.S.C. §213(b)(8), Wage and Hour opinion letter WH-477, January 22, 1979, these were repealed. The exclusions in §207 were generally for seasonal workers, and although the exclusions extend the maximum hours allowed in a day, overtime must still be paid after 48 hours.

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In conclusion, in order to circumvent these state provisions, a plan of employment wherein the manager met the executive exclusions, or by which you devised a lease-back arrangement making them sole proprietor would seem to be the only solution to avoid real overtime jeopardy. I must caution you, however, that certain lease arrangements have been set aside by Montana courts within the past three years with heavy financial consequences to the lessor-company. This was a gas station-convenience store situation, but the 24 hour manager idea was similar.

Very truly yours,

DAVIDSON, POPPLER & VANNOY, P.C.

A handwritten signature in cursive script, appearing to read "Doris M. Poppler", written in dark ink.

DORIS M. POPPLER

DMP/dmg



CONSIDERATION OF HOUSE BILL NO. 727: Rep. Cal Winslow, House District 89, sponsor of the bill, stated this bill would exempt resident managers of lodging establishments from minimum wage and overtime laws. This would effect small motel managers generally managed by married couples who live on the premises. It is economically unfeasible for small motels to survive under current law. Rep. Winslow feels there is potential lawsuits for the small motels because last year a motel had to pay \$19,000 to a former manager who took her case to the Labor Standards Division.

PROPOSERS: Mr. Phil Strobe, representing the Montana Innkeepers Association, urged support of the bill.

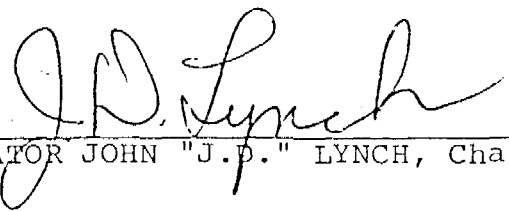
OPPOSERS: There were no opponents present.

QUESTIONS (OR DISCUSSION) ON HOUSE BILL NO. 727: Senator Manning asked Ms. Hartman if there have been many cases of live-in managers applying for overtime compensation. Ms. Hartman stated this has not been a large problem.

Rep. Winslow closed by stating this has not been a large problem, but there is potentially a large liability present if someone chooses to take it to court.

DISPOSITION OF HOUSE BILL NO. 727: Senator Galt made a motion that House Bill 727 BE CONCURRED IN. House Bill 727 was HELD IN COMMITTEE DUE TO A 4-4 TIE VOTE. (See attached roll call vote sheet.)

ADJOURNMENT: There being no further business to come before this committee, the hearing adjourned at 2:20 p.m.

  
SENATOR JOHN "J.D." LYNCH, Chairman

CHAIRMAN--SEN. JOHN "J.D." LYNCH  
NORMAL SCHEDULE==> SITE: ROOM 413/415

DAYS: T-T-S

TIME: 1:00 P.M.

SECRETARY--JULIE RADEMACHER

| --BILL NO--     | REFER DATE | HEARING DATE | CONSIDERATION DATES                                                        | COMMITTEE ACTION  | REREFERRED TO COMM | DATE OUT |
|-----------------|------------|--------------|----------------------------------------------------------------------------|-------------------|--------------------|----------|
| HB0381          | 2/12       | 3/19         | 03/19/87; 03/26/87                                                         | CONCUR AS AMENDED | 02/10/87           | 03/26/87 |
| GRADY, ED       |            |              | COSMETOLOGISTS' UNEMPLOYMENT AND WORKERS' COMPENSATION COVERAGE            |                   |                    |          |
| HB0640          | 2/17       | 3/12         | 03/12/87                                                                   | CONCUR AS AMENDED | 02/17/87           | 03/12/87 |
| SWIFT, BERNIE   |            |              | REQUIRE WORKER TO NOTIFY OF INJURY WITHIN 24 HOURS TO CLAIM WORKERS' COMP. |                   |                    |          |
| HB0689          | 2/21       | 3/12         | 03/12/87                                                                   | CONCUR            | 02/21/87           | 03/12/87 |
| SWIFT, BERNIE   |            |              | WORKERS' COMP. INDEPENDENT CONTRACTOR EXEMPTION EFFECTIVE UNTIL CHANGED    |                   |                    |          |
| HB0699          | 2/23       | 3/12         | 03/12/87                                                                   | CONCUR AS AMENDED | 02/23/87           | 03/12/87 |
| WALLIN, NORM    |            |              | EXCLUDE OUTSIDE SALESMEN FROM OVERTIME COMPENSATION REQUIREMENTS           |                   |                    |          |
| HB0727          | 2/23       | 3/19         | 03/19/87                                                                   | 4/4/ae            | 02/23/87           |          |
| WINSLOW, CAL    |            |              | EXEMPT LIVE-IN EMPLOYEES FROM MINIMUM WAGE AND OVERTIME LAW                |                   |                    |          |
| HB0765          | 3/03       | 3/17         | 03/17/87                                                                   |                   |                    |          |
| VINCENT, JOHN   |            |              | MONTANA JOBS ACT                                                           |                   |                    |          |
| HB0772          | 2/23       | 3/24         | 03/24/87; 03/26/87                                                         | CONCUR AS AMENDED | 02/23/87           | 03/26/87 |
| BRANDEWIE, RAY  |            |              | REVISE PREVAILING WAGE RATE LAWS                                           |                   |                    |          |
| HB0810          | 3/02       | 3/19         | 03/19/87                                                                   | CONCUR            | 03/02/87           | 03/19/87 |
| HARRINGTON, DAN |            |              | PROVIDE HEAD START EMPLOYEES RIGHT TO BARGAIN COLLECTIVELY                 |                   |                    |          |
| HB0884          | 4/03       | 4/07         | 04/07/87; 04/09/87                                                         | CONCUR AS AMENDED | 4/04/87            | 4/09/87  |
| SMITH, CLYDE    |            |              | PAYROLL TAX TO FUND WORKERS' COMP. PLAN NO. 3; SALE OF BONDS               |                   |                    |          |

## LABOR AND EMPLOYMENT RELATIONS COMMITTEE

50th LEGISLATIVE SESSION -- 1987

Date March 19, 1987

| NAME                          | PRESENT | ABSENT | EXCUSED |
|-------------------------------|---------|--------|---------|
| John "J.D." Lynch<br>Chairman | X       |        |         |
| Gene Thayer<br>Vice Chairman  | X       |        |         |
| Richard Manning               | X       |        |         |
| Thomas Keating                | X       |        |         |
| Chet Blaylock                 | X       |        |         |
| Delwyn Gage                   | X       |        |         |
| Jack Haffey                   | X       |        |         |
| Jack Galt                     | X       |        |         |
|                               |         |        |         |
|                               |         |        |         |
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|                               |         |        |         |

Each day attach to minutes.

# ROLL CALL VOTE

SENATE COMMITTEE LABOR AND EMPLOYMENT RELATIONS

#B

Date March 19, 1987 Bill No. 727 Time 2:20 p.m.

| NAME                        | YES | NO |
|-----------------------------|-----|----|
| John "J.D." Lynch, Chairman |     | X  |
| Gene Thayer, Vice Chairman  | X   |    |
| Richard Manning             |     | X  |
| Thomas Keating              | X   |    |
| Chet Blaylock               |     | X  |
| Delwyn Gage                 | X   |    |
| Jack Haffey                 |     | X  |
| Jack Galt                   | X   |    |
|                             |     |    |
|                             |     |    |
|                             |     |    |
|                             |     |    |
|                             |     |    |

Julie Rademacher  
Secretary

John "J.D." Lynch  
Chairman

Motion: Be Concurred In 4/4 tie

\_\_\_\_\_

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